NAAG adds that if the "LEC cannot determine whether the switch was authorized and lawfully implemented, the disputed charges should be deleted from the LEC bill, permitting the carrier to pursue independent collection action." NAAG claims this procedure is similar to credit card collection practices. NAAG Comments at p. 7. However, if disputed charges are deleted from the LEC bill, the carrier will have no basis on which to collect the charges. The carrier needs to establish the charges in question to collect on them.

3. NAAG's Proposals Regarding InterCarrier Liability Are Workable But Need Modification.

NAAG asks the Commission to strengthen its rule on intercarrier liability. First, it wants the Commission to make clear that slamming carriers are liable for all transaction costs including payment of amounts required to make subscribers whole such as re-rating of unauthorized toll calls. NAAG Comments at p. 8.

Clearly offending carriers should be made to pay all reasonable transaction costs involved. This is not objectionable as long as there is a concrete definition of slamming implemented and procedural safeguards set in place to ensure that a carrier is rightfully found guilty of slamming. The transaction costs should cover only reasonable costs otherwise properly authorized carriers could use a finding of slamming against another carrier to drive up the penalty for anticompetitive reasons.

Second, the proposed rule on reimbursement procedures is set in motion only upon a notification by the properly authorized carrier or the subscriber. The measure should be expanded to encompass LECs, other carriers or government agencies. NAAG Comments at p. 8.

There is no reason to expand the nature of the parties who can set in motion the reimbursement rule. The properly authorized carrier, the subscriber and the accused carrier comprise the universe of parties to which the reimbursement procedure applies, there is no reason to allow for other carriers or government agencies to set the procedure in motion.

NAAG would destroy competition by putting any, or offering more, authority in LECs to police this troublesome area. LECs already abuse their roles in the process and will certainly take advantage of any "official recognition" or "beknighting" by the FCC or other government agencies as "partners" in the regulatory efforts to fight slamming.

Third, NAAG asks that carriers be required to retain LOAs and verification records for two years. LOAs and verification documentation should be available to consumers upon written or oral request and without having to furnish a signature sample. Also, the NAAG wants carriers to be required to report slamming complaints on a periodic basis. NAAG Comments at p. 8. There should be some way to ensure that it is actually the customer that is requesting the documentation.

Fourth, the proposed reimbursement procedures should be expanded to clearly prescribe that carriers establish a dispute resolution mechanism to resolve slamming complaints. NAAG Comments at p. 9. It would be prudent for most carriers to have a dispute resolution mechanism

already in place, especially given the prevalence of complaints. The Commission should be wary of dictating the nature of such a mechanism because that interferes with the management discretion of a carrier. The enhanced slamming rules already provide ample protection for the consumer. Plus, it would be the carrier's folly if it did not have a proper procedure, as it should seek to amicably resolve every complaint.

4. NAAG's Proposals Regarding Telemarketing Change Orders Are Overly Broad.

NAAG strongly supports extending verification procedures to all telemarketing change orders. NAAG also seeks verification for bundled service orders. NAAG Comments at pp. 9-10.

NAAG fails to recognize that customer-initiated calls are a different type of situation than carrier-initiated calls. This is not to say that there are no dangers involved in the former situation, but the Commission should strive to provide rules that are more tailored and cost-efficient in the area of customer-initiated calls. ACTA's proposal on this issue, found on pages 26-27 of ACTA's Comments, shows a prudent approach to handling the situation.

5. NAAG's Opposition to Preemption Is Contrary to the Plain Language of the Statute.

NAAG states that:

> [i]n its enactment of Section 258, Congress has made clear its intent not to preempt state law enforcement, regulatory measures and other remedies against slamming. The Commission staff has supported state enforcement efforts, and courts have recognized that verification procedures do not preempt state deceptive practice statutes. Nevertheless, an explicit expression of the Commission's intent not to preempt state measures that provide for similar or additional protections or state enforcement actions, as long as they do not conflict with Commission

> requirements, would be helpful in dealing with preemption issues in future enforcement actions.

NAAG Comments at p. 13.

NAAG is attempting to play a game of semantics in its quest to expand state power in the area of slamming. Section 258 clearly limits the state role to enforcement of Commission verification procedures. *See* ACTA's Comments at pp. 19-23. The states clearly cannot craft their own expanded protections. This would clearly conflict with the Commission's prerogative and balkanize the issue of slamming. Here, the states are attempting to aggrandize their power despite a clear statutory directive to the contrary.

6. NAAG's Support of the Bright Line Test for Notification of Underlying Carrier Change Ignores Industry Realities.

NAAG supports the "bright line" test posited by the Commission stating that "it conforms to long-standing and fundamental tenets of established consumer protection law that it is an unfair practice to substitute a different product or service from the one purchased." NAAG Comments at pp. 13-14.

NAAG ignores a fundamental reality of the resale market -- i.e. that in the vast majority of cases the customer has no idea who the underlying carrier is. This is the way the underlying carrier and the reseller want it, and the customer could often care less who the underlying carrier is. Thus, there is no product substitution involved in a change in underlying carrier -- the customer is getting the product it purchased -- the long distance services of the reseller.

In the cases where the reseller does market the underlying carrier, the reseller is acting as the mere agent for the underlying carrier. Prevailing principles of agency law will adequately protect those customers. There is simply no need for a bright line test. Equally important, it violates established practice and precedent and is anticompetitive.

7. NAAG Seeks to Expand State Jurisdiction.

NAAG asserts that while the Commission's enhanced verification procedures will help, "they provide an after-the-fact approach to the underlying problem: deception, fraud, abusive practices and related consumer misunderstanding and confusion in the sales transaction." They claim that slamming complaints generally describe two types of carrier misconduct: (1) submission of change orders based on forged LOAs or fictitious oral transactions; (2) submission of change orders when deception and abusive tactics were used to obtain purported authorization. Only as a footnote do they note that "some slamming complaints may also result from buyer's remorse of inadvertent clerical errors." NAAG Comments at p. 14, fn. 19.

Deceptively buried on the last pages of their Comments is NAAG's real goal -- license to expand the definition of slamming to customers procured by deceptive sales tactics. This is the danger that ACTA chronicled -- the preying on the amorphous definition of slamming to effect a limitless expansion of the term.

NAAG expounds on why they feel verification procedures are not the solution:

> [T]he Commission's first remedial measure, verification of prior authorizations, does not deal directly with the underlying abuse. Verification procedures are least likely to deter or prevent fraud or forgery. A carrier or marketing agent

> intentionally submitting a fraudulent change order will also likely falsify verifications, although the verification process makes fraud more difficult. Furthermore, post-sale verification procedures may not limit abusive sales tactics that use lies, half-truths and misimpressions to obtain authorization. Unscrupulous telemarketers may use verification procedures that compound initial deception instead of confirming authorization for change orders. Post-sale verification is an incomplete remedy for slamming.

NAAG Comments at p. 14. NAAG urges that Commission should directly prohibit carriers from using deceptive or abusive practices evidenced in slamming complaints such as misrepresentation of affiliation with established carriers, misrepresentation of discounts or savings, and failing to disclose that a preferred carrier will be changed.

Specifically NAAG urges the Commission to set standards such as those the FTC has put in place for telemarketing sales. This, it argues, would deal with abuses and root causes of slamming and ameliorate consumer confusion. NAAG Comments at pp. 15-16.

Slamming is the unauthorized change of a carrier. NAAG is effectively arguing that even in those cases where the customer did authorize the change, the authorization may have been procured through deceptive sales practices. In effect, NAAG wants to take the slamming inquiry into the mind of each consumer to see if the decision was the product of free choice or deception. As one can imagine, such an inquiry is fraught with uncertainty and the potential for abuse.

The slamming definition is clearly being stretched too far when it focuses on the initial interaction between the carrier and consumer. Rather than a bright line focus on what is authorized and verified, NAAG would substitute subjective expositions on the nature of the interplay between consumer and carrier. It is unclear why, if as NAAG asserts, carriers are

subject to state deceptive trade practices acts that the definition of slamming needs to be expanded to cover these issues. This also suggests that, if the states are getting slamming complaints pertaining to deceptive sales practices, many complaints are being improperly characterized as slamming.

Additionally, NAAG's position contradicts its position on pre-emption. Indeed, it supports the need for pre-emption if competitive marketing of telecommunications services is to survive, indeed, if commercial speech is to survive. No matter how overblown NAAG makes the problem of slamming, this country does not support such totalitarian methods or attacks as displayed by NAAG's extremism. How many layers of bureaucratic meddling must there be? How stupid, irresponsible, careless and helpless does the NAAG think American consumers are?

8. NAAG's Suggestion That Subscribers Should Be Notified of Preferred Carrier Changes Is Contradictory.

NAAG wants a clear and conspicuous notice in the subscriber's telephone bill that the presubscribed carrier has been changed and the date on which service is to be effective. NAAG Comments at p. 16.

Once again the logic of NAAG is elusive -- it says notice is important because subscriber's routinely pay phone bills like utility bills and do not notice a change in carrier. Yet one wonders how putting a notice in there will improve the situation. If consumers' carelessness and inattention is the cause of their being deceived or misled, additional notices will do no good -- the notices will probably be ignored. Perhaps NAAG would wish to act as a clearinghouse and have

all orders confirmed through their state offices. The folly of extreme and punitive measures is deafeningly pronounced.

9. NAAG Misinterprets 47 C.F.R. § 64.1100(c).

NAAG wants the existing verification methods to be strengthened as well. For instance, it calls for clear and conspicuous disclosure of material information as enumerated in 47 C.F.R. § 64.1100(c) in independent third party verification. NAAG Comments at p. 17.

NAAG overstates what is required by 64.1100(c). That section requires that oral authorization be obtained to submit the PIC change and that appropriate verification data be obtained. Clearly this communicates to a customer that their phone service is being changed. If a company's verification procedures do not conform to these requirements, the solution is to enforce the existing rules not create new ones where new rules are not needed.

What NAAG seems to argue is it wants something akin to a verbal LOA in the verification portion of the call. The vast majority of verification scripts already communicate to consumers that they are changing carriers. If customers do not understand that, they are at fault, not the carrier. The realities of telephone solicitation do not provide the time for the verifier to go through the litany of requirements in 47 C.F.R. § 1150(e). Imposing such requirements would needlessly burden such carriers. 47 C.F.R. § 1100(c) adequately contains the important elements of what is, and what should be, required in a verification call.

Second, NAAG desires that independent verification be separate from the sales transaction. NAAG opposes three-way calls which involve the subscriber, the telemarketing rep, and the

verifier. NAAG claims that the subscriber is still under the influence of the telemarketer at this point. NAAG Comments at p. 17.

This is another shocking example of the lack of reasoned analysis on the part of NAAG. NAAG takes an unsubstantiated assertion -- i.e., that the subscriber is still in the thrall of the telemarketer -- and seeks to impose an overbroad solution -- that a separate verification call needs to be made. The underlying basis of the NAAG scenario is the prevailing theme of all its scenarios -- that of the ignorant or lazy consumer. Surely once the consumer talks to the verifier they realize that they are talking to a different person and that they are being asked to verify what has just transpired. To make the carrier pay for another call and wait to get in contact once more with the person authorized to make the change and wait for verification will be to doom carriers to many lost customers and higher costs. All this to alleviate NAAG's overblown view of the near hypnotic influence NAAG ascribes to telemarketers.

In the final analysis, NAAG's extreme positions clearly reveal its indefensible motivations to aggrandize its political image by expanding its limited role in consumer protection; to unfairly punish a single industry; to ignore the careful balancing of consumer/carrier rights and regulations established by Congress and state regulatory policies; to stymie commercial free speech; to rely on innuendo and assumption rather than evidence to exact penal remedies; to interfere with standard commercial marketing practices; to layer suffocating bureaucracy over the industry; to unconstitutionally reallocate revenues and assets among competing carriers; and to substitute totalitarian attitudes and measures for balanced law enforcement. The extremism of NAAG's

position is simply shocking in its scope and raises serious concerns that, if followed to any degree, would deny the telecommunications industry and its members constitutional rights of free speech, equal protection, due process, protection of property rights and freedom from cruel and unusual punishment. NAAG's asserted positions are the best evidence of the need for and the rectitude of the position that this area is in dire need of a clear affirmation that Section 258 of the Act preempts state jurisdiction.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt ACTA's proposals.

Respectfully submitted,

AMERICA'S CARRIERS
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CERTIFICATE OF SERVICE

I, Suzanne M. Helein, a secretary in the law offices of Helein & Associates, P.C., do hereby state and affirm that I have caused copies of the foregoing "Comments of the America's Carriers Telecommunication Association ("ACTA") In Response to Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration," in Docket No. 94-129, to be served, via hand-delivery, on this 30th day of September, 1997, upon the following:

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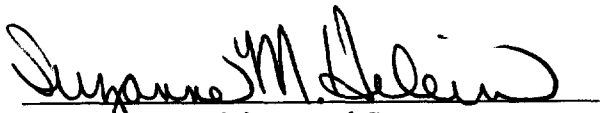

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